

Del. Op. Atty. Gen. 77-037, 1977 WL 24790
 (Del.A.G.)

Office of the Attorney General
 State of Delaware
 OPINION NO.: 77-037

December 28, 1977

Honorable William J. O'Rourke
 Secretary
 Department of Public Safety
 P. O. Box 818
 Dover, Delaware 19901

QUESTION: Is the Department of Public Safety required to allow a bidder to a contract to inspect the bids submitted by the other vendors bidding on the contract?

ANSWER: Yes. Bid submissions are open for public inspection including inspection by other bidders to the contract, unless information contained therein is exempted from public disclosure by the "Sunshine Law", 29 Del. C. Ch. 100. If such information is exempted from public disclosure it should be deleted but the rest of the information must be opened to inspection.

DISCUSSION:

The facts surrounding this request are that the Department of Public Safety advertised for bids on a communications processor. After the award of the contract was made, one of the unsuccessful bidders requested that he be allowed to inspect the bid packages submitted by the other bidders. The question raised is whether the Department must allow such inspection.

Bidding of contracts in Delaware is controlled by 29 Del. C. Ch. 69. Opening bids is controlled by 29 Del. C. § 6907 which provides, in part:

The bid shall be publicly opened at the time and place specified.....

Since the phrase "publicly opened" is not defined in Chapter 69 or elsewhere in the Delaware Code, it must be read in context and defined according to

common and approved usage unless it has gained a peculiar meaning in law. 1 Del. C. § 303; E. I. duPont DeNemours & Co. v. Clark, Del. Ch., 85 A. 2d 721 (1952). The verb "open" is defined in Black's Law Dictionary, Revised Fourth Edition, as follows:

To render accessible, visible or available; to submit or subject to examination, inquiry, or review, by the removal of restrictions or impediments. The adverb "publicly" is defined in Webster's Seventh New Collegiate Dictionary as follows:

1. In a public manner; OPENLY
- 2a. By the public generally, 2b. By the "government".

Therefore, the clear and plain meaning of the phrase "publicly opened" as contained in 29 Del. C. § 6907 is that the General Assembly intended that the bids should be opened under the public eye.

This is consistent with the primary purpose of bidding statutes. As stated by the Delaware Supreme Court in Delaware Technical and Community College v. C & D Contractors, Inc., Del. Supr., 338 A. 2d 568 (1975);

The primary purpose of statutes governing bidding on public works is to protect funds. Fetters v. Mayor & Council of Wilmington, 31 Del. Ch. 319, 72 A. 2d 626 (1950); W. Paynter Sharp & Sons, Inc. v. Heller, Del. Ch., 280 A. 2d 748 (1971).

Any question involving the disclosure of documents in the possession of a state agency must be considered in light of the State's Freedom of Information Act (known as the "Sunshine Law"), and thus whether that act requires disclosure of bidding material. [FNa] Section 10001 of Title 29 states the purpose of the Sunshine Law:

It is vital in a democratic society that the public business be performed in an open and public manner so that the citizens shall be advised of the performance of public officials and of the decisions that are made by such officials, in formulating and executing public policy. Toward this end, this Act is adopted, and shall be construed.

Twenty-nine Del. C. § 10003 requires that "public records" be opened to inspection and copying by any citizen of the State of Delaware. The definition of "public record" contained in 29 Del. C. § 10002

states:

“Public record” is written or recorded information made or received by a public body relating to public business. For purposes of this Act, the following records shall not be deemed public).’ Therefore, since the bid documents which are the subject of this opinion are written information “received by a public body relating to public business” they are subject to inspection under the Sunshine Act unless they fall within one of the exceptions set out in 29 Del. C. § 10002. The only exemption which need be discussed in considering this question protects from disclosure under the Act, “Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.”

A trade secret is described in the Restatement of Torts, § 757, Comment B, as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. See also Space Aero Products Co., Inc., et al. v. R. E. Darling Company, Inc., 208 A. 2d 74 (Md. App. 1955).

The Court in Space Aero Products Co., Inc., et al. v. R. E. Darling Company, Inc., *supra*, listed some of the factors which must be considered in determining whether information is a trade secret.

These factors are:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended by him in developing the information;
6. the ease or difficulty with which the information could properly be acquired or duplicated by others.

It is, however, a factual question as to whether something constitutes a trade secret. In conjunction with the factors listed above it must be remembered that limited publication of a trade secret may not

destroy the owners right in that trade secret. Absolute secrecy is not required. Data General Corporation v. Digital Computer Controls, Inc., Del. Supr., 297 A. 2d 437 (1972); Data General Corporation v. Digital Computer, Inc., Del. Ch., A. 2d 105 (1975).

The second part of the exception listed in 29 Del. C. § 10002(2) is “commercial or financial information obtained from a person which is of a privileged or confidential nature”. This type of information, like trade secrets, must be unique information not known to the industry or the public in general which would give a competitor an advantage. This would not include matters of substance relating to the product or services bid on, such as the quoted price or information relating to the product which was not a trade secret, etc. It would include information which may have been required to be submitted in order that the agency could evaluate the company but which, if released, would greatly harm the company and might be used by a competitor.

More specifically, in discussing what is exempted from public disclosure as commercial or financial information under 5 USC § 552(b)(4), which provision is very similar to 29 Del. C. § 10002(2), the Court of Appeals in National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir., 1974) held:

“To summarize, commercial or financial matter is ‘confidential’ for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” See also Petkas v. Staats, 501 F. 2d 887 (D.C. Cir., 1974).

Since the authority cited above clearly indicates that there must be a factual determination made on a case by case basis, it is suggested that someone with knowledge and expertise in the field review the documents to determine whether particular information within any of the bid documents constitute trade secrets or commercial or financial information. It should also be pointed out that simply because the document contains certain privileged information it does not mean the entire document can be withheld. Those portions that are exempt from disclosure should be deleted and the rest of the documents opened for inspection. In addition, an equally troublesome question is whether or not bid documents may pertain to pending or potential litigation and thus not disclosable to the public under

29 Del. C. § 10002(d)(9). Since each bid question potentially involves litigation, our Office should be consulted on each bid document request to determine if the circumstances warrant non-disclosure under section 10002(d).

If you have further questions concerning this matter, please feel free to contact me.

Very truly yours,
Malcolm S. Cobin
Assistant Attorney General

APPROVED BY:

RICHARD R. WIER, JR.
ATTORNEY GENERAL

[FNa]

. See also Attorney General's Opinion 77-029 which deals with disclosure of documents.

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